** E-Filed 07/30/2007 **

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

TCGIVEGA INFORMATION TECHNOLOGIES PVT, LTD., Plaintiff, v. KARNA GLOBAL TECHNOLOGIES, INC.; KANNAN R. AYYAR; JNANA R. DASH AKA JNAN DASH; and GREGORY D. HAWKINS, Defendants.	Case Number C 05-5222JF ORDER[1] GRANTING DEFENDANTS' MOTION FOR LEAVE TO FILE A COUNTERCLAIM [re: docket no. 82]

I. BACKGROUND

On December 16, 2005, Plaintiff TCGIvega Information Technologies PVT, LTD. ("TCGIvega") commenced the present action against Defendants Karna Global Technologies, Inc. ("Karna"), Kannan R. Ayyar ("Ayyar"), Jnana R. Dash ("Dash"), and Gregory D. Hawkins ("Hawkins"), alleging six claims for relief. TCGIvega alleges that Karna and Ayyar breached their contractual obligation to pay $312,000 for services performed by TCGIvega. Plaintiff further alleges that Ayyar, a director and officer of Karna, commingled his personal funds with

[1] This disposition is not designated for publication and may not be cited.

those of the corporation such that there was a unity of interest and ownership between Ayyar and Karna. The only claim alleged against Dash and Hawkins, non-officer directors of Karna, is a claim for breach of fiduciary duty.

Karna and Ayyar filed their answer on January 20, 2006. The Court initially entered a default against Dash and Hawkins, but the default was set aside on May 12, 2006. Dash and Hawkins answered the complaint on May 22, 2006. The parties have twice attempted settlement, first in August 2006, and then again in March 2007. The March settlement discussions resulted in an draft settlement agreement that was never executed because of a subsequent disagreement regarding the terms. On May 23, 2007, Plaintiffs moved to compel depositions and filed a motion for sanctions, alleging that Defendants had thwarted Plaintiff's discovery efforts during the preceding months. Defendants claimed that they disregarded discovery orders because of the pending settlement. On June 20, 2007, Magistrate Judge Lloyd granted Plaintiff's motions to compel depositions and for sanctions, finding that Defendants disregarded deposition notices even after both parties knew that the settlement agreement would not be executed.

On March 31, 2007, Defendants filed the instant motion for leave to file a counterclaim for breach of contract against TCGIvega. The proposed pleading alleges that TCGIvega's poor performance on behalf of Karna caused Karna to lose the Wellpoint project and a significant amount of revenue. Plaintiff opposes the motion. The Court heard oral argument on July 27, 2007. Upon consideration of the moving and responding papers,[2] as well as the arguments presented, the motion will be granted.

[2] Plaintiff objects to and moves to strike the Declaration of Antoinette McGill in support of Defendants' motion. Plaintiff contends that Ms. McGill, who joined the Chugh Firm in March 2007, does not have the requisite personal knowledge to support the statements made in her declaration. Plaintiff also contends that the declaration contains conclusory and argumentative statements. The Court agrees that Ms. McGill's repeated use of bold, underlined statements is argumentative, and that many of her statements are conclusory. Ms. McGill subsequently has provided an additional declaration with respect to her personal knowledge of the case; however, her original declaration has not been considered by the Court.

II. LEGAL STANDARD

The standards governing a motion for leave to file a counterclaim pursuant to Federal Rule of Civil Procedure 13(f) are the same as those governing a motion for leave to amend a pleading under Rule 15(a). *Magnesystems, Inc. v. Nikken, Inc.*, 933 F. Supp. 944, 947-48 (C.D. Cal. 1996); *Cooper Development Co. v. Employers Insurance of Wausau*, 765 F. Supp. 1429, 1431 (N.D. Cal. 1991). Rule 15(a) provides that leave shall be freely given when justice so requires, thus the Court liberally will allow counterclaims to be filed, particularly compulsory counterclaims which later may be barred by the doctrine of *res judicata* if leave to file is denied. *Barnes Group, Inc. v. C&C Products, Inc.*, 716 F.2d 1023, 1035 n.35 (4th Cir. 1983); *Cooper*, 765 F. Supp. at 1432. Accordingly, leave should be denied only where there is a showing of undue delay, bad faith, futility, or prejudice to the opposing party. *Magnesystems*, 933 F. Supp. at 947-48; *Cooper*, 765 F. Supp. at 1431.

III. DISCUSSION

Defendants assert that their failure to file a counterclaim with their original answers was a result of inadvertence. Rule 13(f) allows Defendants, with leave of the Court, to submit their counterclaim by amendment if they have failed to plead the counterclaim through oversight, inadvertence, excusable neglect, or whenever justice requires. Defendants contend that their attention and resources were focused upon responding to the motion for default judgment against them and their significant efforts at settlement. The Court accepts Defendants' admission that their failure to include this counterclaim in their original pleadings was inadvertent and, therefore, will address the parties' arguments regarding undue delay and prejudice.

Plaintiffs correctly assert that a relevant factor in determining undue delay is whether the moving party knew or should have known when the original pleading was filed the facts and theories raised by the proposed amendment. *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1388 (9th Cir. 1990). The answers filed by Dash and Hawkins assert TCGIvega's substandard work performance as an affirmative defense. Thus, seemingly by their own admission, Defendants had the requisite knowledge of this theory in May 2006 to file a counterclaim with their answers. The Court agrees with Plaintiff that the intervening twelve-month delay appears to be undue.

However, while undue delay is one factor to be considered, "it is the consideration of prejudice to the opposing party that carries the greatest weight." *Eminence Capital, LLC* v. *Aspeon, Inc.,* 316 F.3d 1048, 1052 (9th Cir. 2003).

Defendants argue that their counterclaim is compulsory and will be barred as res judicata if they are denied leave to file. This prejudice must be weighed against the prejudice asserted by Plaintiff. *See Bell v. Allstate Life Insurance Co.*, 160 F. 3d 452, 454 (8th Cir. 1998). Plaintiff acknowledges that the counterclaim is compulsory, but asserts that the additional discovery required as to the damages sought pursuant to the counterclaim would cause it great prejudice.[3] However, Plaintiff concedes that a number of depositions already have occurred regarding the affirmative defense that TCGIvega's work was substandard. Defendants assert that three additional individuals, whose depositions already have been scheduled, are the only other witnesses with respect to the counterclaim.[4] Under these circumstances, it appears that no significant additional discovery will be required by the addition of the counterclaim. Accordingly, Defendants' motion for leave will be granted.

IV. ORDER

Good cause therefor appearing, IT IS HEREBY ORDERED, Defendants' motion for leave to file a counterclaim is GRANTED.

DATED: July 30, 2007

JEREMY FOGEL
United States District Judge

[3] The cut-off date for non-expert discovery and disclosure of expert witnesses is August 3, 2007, and the date to complete discovery is August 24, 2007.

[4] It is apparent that both parties already have explored the question of whether TCGIvega's work was substandard through discovery that already has been completed. Plaintiff contends that this discovery shows that the proposed counterclaim is without merit. By permitting Defendants to file the counterclaim, the Court in no way intends to suggest that the parties may avoid the effects of discovery that already has been completed.

This Order has been served upon the following persons:

Michael William Stebbins	mstebbins@be-law.com
Jaipat Singh Jain	jjain@lpgk.com
Melinda Mae Morton	mmorton@be-law.com
Antoinette McGill	antoinette.mcgill@chugh.com

Karna Global Technologies, Inc
c/o Kannan Ayyar, President
2025 Gateway Place
Suite 200
San Jose, CA 95110-1000